

It seems to me very clear, that the terms had never been complied with by Schley, upon which the mortgage was to be registered, nor could they be complied with, without first paying the judgment to Albert, because until it was paid, the certificate which Mr. Schley said he should require that there were no liens on the property, could not be procured.

But, even if there ever was a period in the whole course of this negotiation when the contract could be considered so far perfect as would have justified the placing the mortgage upon record, it is evident that for some cause or other, it was afterwards abandoned, and the mortgage given up to be cancelled, and that it was cancelled accordingly.

If it be said that Schley, the trustee, had no right to surrender the mortgage after he had actually loaned Dall \$6000, of the trust fund, the answer is, that if he was guilty of a breach of trust in so doing, his bond was responsible for it, and although the parties to the bond may not be good, that is no reason why the consequences of a violation of his duty as trustee, should be thrown upon innocent third persons who had nothing to do with taking it, and who had no right, at any time, to object to its sufficiency as the *cestui que trusts* had.

It would, as it seems to me, be extremely difficult to maintain even as against Dall, the specific execution of this contract for a mortgage. In the first place, there is nothing upon the face of this record to show the precise terms and conditions, contained in it; but even if these could be made out, how could the creditor call for the execution of a contract for a mortgage, when after it was executed and placed in his hands he had voluntarily surrendered it to the mortgagor to be cancelled, and he had cancelled it. That the mortgagee was acting in a fiduciary capacity can make no difference, because, for any violation of his duty as trustee, the remedy of the parties injured was upon his bond.

But, if there would be difficulty in enforcing this alleged contract as against Dall, surely the difficulties are increased when an attempt is made to enforce it against his creditors, and more especially against purchasers for value. To enforce it